

## **RFP Section 4: CONTRACT TERMS AND CONDITIONS**

### **4.1 Contract Documents**

This RFP, any amendments, the response and any response amendments of the Contractor, and the State of Kansas DA-146a (Contractual Provision Attachment) shall be incorporated into the written contract, which shall compose the complete understanding of the parties.

In the event of a conflict in terms of language among the documents, the following order of precedence shall govern:

1. Form DA146a;
2. written modification to the executed contract;
3. written contract inclusive of any agreed-upon Statement of Work signed by the parties;
4. the RFP, including any and all amendments; and
5. Contractor's written proposal submitted in response to the RFP as finalized.

### **4.2 Contract**

The successful Contractor will be required to enter into a written contract with the State. The Contractor agrees to accept the provisions of Form DA 146a (Contractual Provisions Attachment), which is incorporated into all contracts with the State and is incorporated into this RFP.

### **4.3 Contract Formation**

No contract shall be considered to have been entered into by the State until all statutorily required signatures and certification have been rendered and a written contract has been signed by the successful Contractor.

### **4.4 Notices**

All notices, demands, requests, approvals, reports, instructions, consents or other communications (collectively "notices") that may be required or desired to be given by either party to the other shall be IN WRITING and addressed as follows:

Kansas Division of Purchases  
900 SW Jackson St, Room 102N  
Topeka, KS 66612-1286  
RE: Bid Event ID Number EVT0000186

or to any other persons or addresses as may be designated by notice from one party to the other.

#### **4.5 Termination for Cause**

The Director of Purchases may terminate this contract, or any part of this contract, for cause which includes but is not limited to any one of the following circumstances:

- The Contractor fails to make delivery of goods or services as specified in the contract;
- The Contractor provides substandard quality or workmanship;
- The Contractor fails to perform any of the provisions of this contract; or

The Contractor fails to make progress as to endanger performance of this contract in accordance with its terms. The Director of Purchases shall provide Contractor with written notice of the conditions endangering performance. If the Contractor fails to remedy the conditions within thirty (30) days from the receipt of the notice (or such longer period as State may authorize in writing); the Director of Purchases shall issue the Contractor an order to stop work immediately. Receipt of the notice shall be presumed to have occurred within three (3) days of the date of the notice.

#### **4.6 Termination for Convenience**

The Director of Purchases may terminate performance of Deliverables and Services under this Agreement in whole or in part whenever, for any reason, the Director of Purchases determines that the termination is in the best interest of the State. In the event that the Director of Purchases elects to terminate performance of Deliverables and Services pursuant to this provision, the Director of Purchases shall provide Contractor written notice at least sixty (60) calendar days prior to the termination date. The termination shall be effective as of the date specified in the notice. In the event of a termination for convenience as provided in this Section, the parties will work in good faith to settle all amounts due between them. Contractor shall be entitled to payment for work performed through the termination date except for any work that was not in compliance with the warranties or Specifications described herein; Section 4.59 will describe the transition process in the event of termination.

#### **4.7 Debarment of State Contractors`**

Any Contractor who defaults on delivery or does not perform in a satisfactory manner as defined in this Agreement may be barred for up to a period of three (3) years, pursuant to K.S.A. 75-37,103, or have its work evaluated for pre-qualification purposes. Contractor shall disclose any conviction or judgment for a criminal or civil offense of any employee, individual, or entity which controls a company or organization that will perform work under this Agreement that indicates a lack of business integrity or business honesty. This includes (1) conviction of a criminal offense as an incident to obtaining or attempting to obtain a public or private contract or subcontract or in the performance of such contract or subcontract; (2) conviction under state or federal statutes of embezzlement, theft, forgery, bribery, falsification or destruction of records, or receiving stolen property; (3) conviction under state or federal antitrust statutes; and (4) any other offense to be so serious and compelling as to affect responsibility as a state Contractor. For the purpose of this section, an individual or entity shall be presumed to have control of a company or organization if the individual or entity directly or indirectly, or acting in concert with one or more individuals or entities, owns or controls 25 percent or more of its equity, or otherwise controls its management or policies. Failure to disclose an offense may result in disqualification of the bid or termination of the contract.

#### **4.8 Rights and Remedies**

If this contract is terminated, the State, in addition to any other rights provided for in this contract, may require the Contractor to transfer title and deliver to the State in the manner and to the extent directed, any completed materials. The State shall be obligated only for those services and materials rendered and accepted prior to the date of termination.

In the event of termination, the Contractor shall receive payment prorated for that portion of the contract period services were provided to or goods were accepted by State subject to any offset by State for actual damages including loss of federal matching funds. The specific amount of payment made to the Contractor shall be subject to an agreed upon amount negotiated between the State and the Contractor and supported by Contractor documentation.

The rights and remedies of the State provided for in this contract shall not be exclusive and are in addition to any other rights and remedies provided by law.

#### **4.9 Force Majeure**

The Contractor shall not be held liable if the failure to perform under this contract arises out of causes beyond the control of the Contractor. Causes may include, but are not limited to, acts of nature, fires, tornadoes, quarantine, strikes other than by Contractor's employees, and freight embargoes.

#### **4.10 Waiver**

Waiver of any breach of any provision in this contract shall not be a waiver of any prior or subsequent breach. Any waiver shall be in writing and any forbearance or indulgence in any other form or manner by either party shall not constitute a waiver.

#### **4.11 Independent Contractor**

Both parties, in the performance of this contract, shall be acting in their individual capacity and not as agents, employees, partners, joint ventures or associates of one another. The employees or agents of one party shall not be construed to be the employees or agents of the other party for any purpose whatsoever.

The Contractor accepts full responsibility for payment of unemployment insurance, workers compensation, social security, income tax deductions and any other taxes or payroll deductions required by law for its employees engaged in work authorized by this contract.

#### **4.12 Staff Qualifications**

The Contractor shall warrant that all persons assigned by it to the performance of this contract shall be employees or contracted agents of the Contractor (or specified Subcontractor) and shall be fully qualified to perform the work required. The Contractor shall include a similar provision in any contract with any Subcontractor selected to perform work under this contract.

Failure of the Contractor to provide qualified staffing at the level required by the contract specifications shall constitute a breach of this contract.

#### **4.13 Subcontractors**

The Contractor shall be the sole source of contact for the contract. The State will not subcontract any work under the contract to any other firm and will not deal with any subcontractors. The Contractor is

totally responsible for all actions and work performed by its subcontractors. As a minimum standard for any subcontract, all terms, conditions and requirements of the contract shall apply without qualification to any services performed or goods provided by any subcontractor as applicable to their specific roles and responsibilities.

The State of Kansas requires tax clearance certificates for all subcontractors be submitted with the technical proposal, and that the Contractor additionally provide subcontractor(s) legal company name, contact information and tax ID number (FEIN/TIN) as well.

#### **4.14 Proof of Insurance**

Upon request, the Contractor shall be present an affidavit of Worker's Compensation, Public Liability, and Property Damage Insurance to the Division of Purchases.

#### **4.15 Conflict of Interest**

The Contractor shall not knowingly employ, during any period of this contract or any extension to it, any professional personnel who are also in the employ of the State and providing services involving this contract or services similar in nature to the scope of this contract to the State. Furthermore, the Contractor shall not knowingly employ, during the period of this contract or any extensions to it, any state employee who has participated in the making of this contract until at least two years after his/her termination of employment with the State.

#### **4.16 Confidentiality**

All State information or data , including but not limited to data or information, electronic or written, or descriptive materials, or any other related matter of any type including but not limited to drawings, blueprints, descriptions, or other papers or documents which contain any such information or data are considered confidential information and data. All information that Contractor visibly and prominently identifies and marks as "Contractor Proprietary and Confidential Information", subject to applicable legal restrictions, shall be considered Confidential Information. Unless otherwise specified herein, each party agrees to return any or all Confidential information and data furnished by the other party promptly upon , in whatever forms they are maintained by the party. Upon termination or expiration of this agreement, each party and each of the persons and entities working for such party shall return to the other party all confidential information of the other party.

Upon termination or expiration of this agreement or at the request of State, the Contractor and each of the persons and entities working for the Contractor shall securely destroy all electronic data provided by the State and sanitize storage media used to store such data in compliance with State of Kansas ITEC policy 7900. The Contractor will provide a media sanitization procedure that meets requirements for data classified by HIPAA as confidential in HIPAA Regulation Part 164.310(d), 1 & 2, subject to State approval. Documentation of the sanitization must be provided to the State following the execution of that process.

Each party will have access to information and private confidential information or data, maintained by the other party, to the extent necessary to carry out their respective responsibilities under this contract. This information and data may include, but is not limited to, personal financial information, information regarding undercover law enforcement agents, social security numbers, student employees, medical providers and/or their recipients, etc. Each party agrees that any information or data it may have in its custody regarding any participant shall be kept strictly confidential. Unless otherwise specified herein, the information and data of each party shall be considered to be confidential and private and each party may not disclose any information or data at any time to any person or entity. Both parties agree to comply with all state and federal confidential laws in providing services under the contract.

1. Contractor shall be fully responsible for providing adequate supervision and training to its agents and employees to ensure compliance with all applicable State and Federal Acts regarding confidentiality and/or open records issues. No private or confidential data collected, maintained, or used in the course of performance of this contract shall be disseminated by Contractor except as required by statute, either during the period of the contract or thereafter. Both parties shall only use confidential information as required by this contract. All electronic data shall be secured through encryption or other comparable security measures.
2. Contractor shall limit access to confidential information solely to staff of Contractor who have a need to know for purposes of fulfilling Contractor's obligations under this contract. Contractor shall not remove confidential information from State's site without State's prior written approval.
3. Contractor shall hold State harmless and indemnify the State for expenses or damages, of any kind, incurred or suffered by the State as a result of the unauthorized disclosure of said data by Contractor or any agent, representative, employee, or subcontractor of Contractor. Contractor shall notify the State of any loss or breach of confidential information or data within 24 hours of receipt of such knowledge. Contractor shall also be responsible and liable for any and all damages to individuals due to such breaches or loss of confidential information. In the event of any security breach in which the confidential information of one or more individuals is compromised or is potentially compromised, Contractor shall be responsible and pay for any and all damages, expenses, and costs (including lost wages and efforts spent to defend or correct against identity theft) caused to the State or any individual for the disclosure of any State Information. Contractor shall provide notice to the State and affected individuals of such disclosure and shall also offer free of charge to the individuals or the State identity theft protection insurance for a period of five years. These terms shall also apply to any third-party Contractor or subcontractor. The amount of any expenses or damages incurred under this section shall not be limited by provisions of section 4.69 *infra*.
4. Contractor certifies that all employees and subcontractors are subject to reasonable provisions to protect Confidential Information similar to the terms of this Section 4.16.
5. The Contractor shall hold all such confidential information in trust and confidence for the State, and agrees that it and its employees will not, during the performance or after the termination of this agreement, disclose to any person, firm, or corporation, or use for its own business or benefit any information obtained by it while in execution of the terms and conditions of this agreement.
6. Any staff, individual, or entity assigned to work for Contractor under this agreement shall separately sign an agreement(s) to the effect of this Subsection and also but not limited to the Department of Administration computer security user agreement.
7. The State will ensure that Contractor's Confidential Information, including information that should by its nature be obviously understood to be confidential, including without limitation social security numbers and personal private information, is not disclosed to others except as required by the Kansas Open Records Act. Contractor acknowledges and agrees that the State may be required to disclose certain information of Contractor pursuant to the Kansas Open Records Act.

#### **4.17            Nondiscrimination and Workplace Safety**

The Contractor agrees to abide by all federal, state and local laws, and rules and regulations prohibiting discrimination in employment and controlling workplace safety. Any violations of applicable laws or rules or regulations may result in termination of this contract.

#### **4.18            Environmental Protection**

The Contractor shall abide by all federal, state and local laws, and rules and regulations regarding the protection of the environment. The Contractor shall report any violations to the applicable governmental agency. A violation of applicable laws or rule or regulations may result in termination of this contract.

#### **4.19 Hold Harmless**

A. The Contractor shall indemnify the State against all third party losses or damages asserted against State for bodily injury or death of any person or damage or destruction of any property to the extent arising out of the Contractor's negligence in the performance of services under this contract. If any claim of infringement of a U.S. patent, copyright, or trade secret is made by any third party against the State, exclusively due to the State's use of any Work Product provided by Contractor hereunder, the State shall notify Contractor and Contractor shall defend, indemnify, and hold the State harmless against any and all liability, losses, claims, expenses (including reasonable attorney's fees), demand, or damages of any kind arising out of or related to any such claim, whether or not that claim is successful. If the State is enjoined, or likely to be enjoined as determined solely by the State, from using any of the Work Product because of a claim of infringement of proprietary rights of any third party, the Contractor at its own expense shall:

- (i) Obtain for the State the right to continue using such Work Product;
- (ii) Replace or modify the Work Product to make it non-infringing, so long as the replacement does not adversely impact functionality or performance of the Work Product running in the State's production environment; or
- (iii) Terminate this Contract and refund all payments made by the State herein.

The forgoing indemnities shall not apply if the actions or omissions of the State are the cause of the infringement.

B. The State shall not be precluded from receiving the benefits of any insurance the Contractor may carry which provides for indemnification for any loss or damage to property in the Contractor's custody and control, where such loss or destruction is to state property. The Contractor shall do nothing to prejudice the State's right to recover against third parties for any loss, destruction or damage to State property.

#### **4.20 Care of State Property**

The Contractor shall be responsible for the proper care and custody of any state owned personal tangible property and real property furnished for Contractor's use in connection with the performance of this contract. The Contractor shall reimburse State for such property's loss or damage caused by Contractor, normal wear and tear excepted.

#### **4.21 Prohibition of Gratuities**

Neither the Contractor nor any person, firm, or corporation employed by the Contractor in the performance of this contract shall offer or give any gift, money, nor anything of value, neither any promise for future reward nor compensation to any State employee at any time.

#### **4.22 Retention of Record**

Unless the State specifies in writing a different period of time, the Contractor agrees to preserve and make available at reasonable times, and at no cost to the State or Federal government, all of its books, documents, papers, records and other evidence involving transactions related to this contract for a period of six (6) years from the date of the expiration or termination of this contract.

Matters involving litigation shall be kept for one (1) year following the termination of litigation, including all appeals, if the litigation exceeds six (6) years.

The Contractor agrees that authorized federal and state representatives, including but not limited to, personnel of the using agency; independent auditors acting on behalf of state and/or federal agencies shall have access to and the right to examine records during the contract period and during the six (6) year post contract period. Delivery of and access to the records shall be within five (5) business days at no cost to the state.

#### **4.23 Antitrust**

If Contractor elects not to proceed with an antitrust cause of action resulting from the performance of the Agreement, Contractor assigns to the State all rights to and interests in any cause of action it has or may acquire under the anti-trust laws of the United States and the State of Kansas relating to the particular products or services purchased or acquired by the State pursuant to this Agreement.

#### **4.24 Modification**

This contract shall be modified only by the written agreement and approval of the parties. No alteration or variation of the terms and conditions of the contract shall be valid unless made in writing and signed by the parties. Every amendment shall specify the date on which its provisions shall be effective.

#### **4.25 Assignment**

Except in the case of the sale of the Contractor, or the applicable business unit thereof performing this Contract, the Contractor shall not assign, convey, encumber, or otherwise transfer its rights or duties under this contract without the prior written consent of the State. State may reasonably withhold consent for any reason.

Except as described above, this contract may terminate for cause in the event of its assignment, conveyance, encumbrance or other transfer by the Contractor without the prior written consent of the State.

#### **4.26 Third Party Beneficiaries**

This contract shall not be constructed as providing an enforceable right to any third party.

#### **4.27 Captions**

The captions or headings in this contract are for reference only and do not define, describe, extend, or limit the scope or intent of this contract.

#### **4.28 Severability**

If any provision of this contract is determined by a court of competent jurisdiction to be invalid or unenforceable to any extent, the remainder of this contract shall not be affected and each provision of this contract shall be enforced to the fullest extent permitted by law.

#### **4.29 Governing Law**

This contract shall be governed by and construed in accordance with the procedural and substantive laws of the State of Kansas.

#### **4.30 Jurisdiction**

The parties shall bring any and all legal proceedings arising under this Contract in the State of Kansas, District Court of Shawnee County. The United States District Court for the State of Kansas sitting in Topeka, Shawnee County, Kansas, shall be the venue for any federal action or proceeding arising hereunder in which the State is a party. The Eleventh Amendment of the United States Constitution is an inherent and incumbent protection with the State and need not be reserved, but prudence requires the State to reiterate that nothing related to this Contract shall be deemed a waiver of the Eleventh Amendment. Contractor shall be responsible for all the State's reasonable attorney's fees, costs and expenses related to Contractor's negligence or breach of Contractor's obligations under the Contract. Contractor waives all defenses of lack of personal jurisdiction and *forum non conveniens*. Process may be served on Contractor in the manner authorized by applicable law or court rule.

#### **4.31 Integration**

This contract, in its final composite form, shall represent the entire agreement between the parties and shall supersede all prior negotiations, representations or agreements, either written or oral, between the parties relating to the subject matter hereof. This Agreement between the parties shall be independent of and have no effect on any other contracts of either party.

#### **4.32 Immigration and Reform Control Act of 1986 (IRCA)**

All Contractors are expected to comply with the Immigration and Reform Control Act of 1986 (IRCA), as may be amended from time to time. This Act, with certain limitations, requires the verification of the employment status of all individuals who were hired on or after November 6, 1986, by the Contractor as well as any subcontractor or sub-contractors. The usual method of verification is through the Employment Verification (I-9) Form.

With the submission of this bid, the Contractor hereby certifies without exception that such Contractor has complied with all federal and state laws relating to immigration and reform. Any misrepresentation in this regard or any employment of persons not authorized to work in the United States constitutes a material breach and, at the State's option, may subject the contract to termination for cause and any applicable damages.

Unless provided otherwise herein, all Contractors are expected to be able to produce for the State any documentation or other such evidence to verify Contractor's IRCA compliance with any provision, duty, certification, or like item under the contract.

Contractor will provide a copy of a signed Certification Regarding Immigration Reform and Control From (<http://www.da.ks.gov/purch/CertificationImmigrationForm.doc>) with the technical proposal.



#### **4.33 Worker Misclassification**

The Contractor and all tiered subcontractors under the Contractor shall classify workers as employees rather than independent Contractors and treat them accordingly for purposes of workers' compensation insurance coverage, unemployment taxes, social security taxes, and income tax withholding. Failure to do so may result in contract termination.

#### **4.34 Injunctions**

Should Kansas be prevented or enjoined from proceeding with the acquisition before or after contract execution by reason of any litigation or other reason beyond the control of the State, Contractor shall not be entitled to make or assert claim for damage by reason of said delay.

#### **4.35 Statutes**

Each and every provision of law and clause required by law to be inserted in the contract shall be deemed to be inserted herein and the contract shall be read and enforced as though it were included herein. If through mistake or otherwise any such provision is not inserted, or is not correctly inserted, then on the application of either party the contract shall be amended to make such insertion or correction.

#### **4.36 Federal, State and Local Taxes**

Unless otherwise specified, the proposal price shall include all applicable federal, state and local taxes. The Contractor shall pay all taxes lawfully imposed on it with respect to any product or service delivered in accordance with this Contract. The State of Kansas is exempt from state sales or use taxes and federal excise taxes for direct purchases. These taxes shall not be included in the Contractor's price quotation. Upon request, the State shall provide to the Contractor a certificate of tax exemption.

The State makes no representation as to the exemption from liability of any tax imposed by a governmental entity on the Contractor.

#### **4.37 Accounts Receivable Set-Off Program**

If, during the course of this contract the Contractor is found to owe a debt to the State of Kansas, agency payments to the Contractor may be intercepted / set-off by the State of Kansas. Notice of the setoff action will be provided to the Contractor. Pursuant to K.S.A. 75-6201 et seq, Contractor shall have the opportunity to challenge the validity of the debt. If the debt is undisputed, the Contractor shall credit the account of the agency making the payment in an amount equal to the funds intercepted.

K.S.A 75-6201 et seq. allows the Director of Accounts & Reports to set-off funds the State of Kansas owes Contractors against debts owed by the Contractors to the State of Kansas. Payments set-off in this manner constitute lawful payment for services or goods received. The Contractor benefits fully from the payment because its obligation to the State is reduced by the amount subject to set-off.

#### **4.38 Definitions**

A glossary of common procurement terms is available at <http://da.ks.gov/purch>, under "Purchasing Forms." To increase clarity associated with the agreement, the following definitions have been added:

- A. Acceptance – is the State's written notification, via the "Deliverable/Service Acceptance Form", to the Contractor that a Deliverable conforms to the applicable Specifications.
- B. Acceptance Date -- is the date upon which the State certifies to Contractor that the KMED conforms in all material respects to the Post Go-Live System Acceptance Checklist.
- C. Acceptance Testing Criteria -- means commercially reasonable standards for evaluating performance under this Agreement that generally conform to the RFP, the Proposals, and Project requirements as defined in the Statement of Work and any Deliverable Expectations Document.
- D. Change Control Process – is a vehicle for proposing changes to the Project. Change Control Requests must follow the Change Control Process attached to the Statement of Work.
- E. Confidential Information – is any and all of the State's information in any form, which relates to the State's past, present or future and disclosed to Contractor in the course of performance of this Agreement and is declared by the State to be confidential or proprietary.
- F. Contract Amendment -- will be the method of altering material or substantive provisions or clauses within the Agreement document, particularly those for significant changes to the Project Plan or to cost of the Project. Any Contract Amendment shall be in writing and signed by the KMED Project Director and the authorized signatory of the Contractor.
- G. Critical Milestone -- is one of the Milestones set forth in Exhibit A.
- H. Custom Software -- consists of all computer modules or programs, procedures, rules, or routines in Object Code, machine-readable language, or Source Code, which instruct the operation of the computer and which are developed by or through Contractor specifically for the State under this Agreement. Such software may be in the form of CDs, tapes, disks, or other methods of recording programs and routines. Custom Software does not include commercial off-the-shelf software.
- I. Deliverable Expectations Document – is a supporting document for the Acceptance process that identifies specific requirements for a Deliverable.
- J. Deliverable/Service Acceptance Form – is the document(s) used to memorialize Acceptance of Deliverables. See Exhibit B.
- K. Delivery Date – is the date and time as agreed by the parties on which a Deliverable shall be received by the State. Delivery of any Deliverable to the State must be received by the designated party of the State by 10:00 a.m. Central Time to be timely.
- L. Deliverables – are the measurable, tangible, verifiable outcomes or results that are produced to complete this Project or part of this Project as identified in the mutually agreed upon Statement of Work. Deliverables are subject to Acceptance by the State's KMED Project Director or other authorized State personnel.
- M. Documentation – is all descriptive, training, operational and instructive material, whether basic or highly detailed and complex, pertinent to any aspect of the KMED Project which may be generated in furtherance of this Agreement. Documentation may include items such as flow charts, instruction manuals, logic diagrams, calculations; program specifications, descriptive information, and materials, file layouts and data models; design documents and specifications, implementation plans and other documentation developed in connection with the installation, planning, acceptance, or other implementation and test plans.
- N. Effective Date -- of the Agreement shall be August 29, 2011.
- O. First Full Functional Use – shall mean the first use of the system in production.

- P. Milestone -- is a significant event in the Project including but not limited to completion of a Deliverable.
- Q. Object Code -- is the machine-executable code derived in whole or part from the compiled Source Code.
- R. Post Go-Live System Acceptance -- is the State's final written notification to the Contractor that the State accepts the KMED as fully-functional and complete.
- S. Post Go-Live System Acceptance Checklist or PSAC -- means the commercially reasonable standards mutually agreed upon by the parties for evaluating final performance of the KMED. See Exhibit C
- T. Pre-Existing Software -- consists of all computer programs, procedures, rules, or routines in Object Code, machine-readable language, including Source Code, which instruct the operation of the computer and existed prior to the effective date of Agreement or are independently developed outside the Project. Such software may be in the form of CDs, tapes, disks, or other methods or recording programs and routines.
- U. Problem -- is any actual, apparent, or suspected failure of a product to conform to its Specifications. Also includes any Services Contractor is performing that do not comply with the standards set forth herein.
- V. Project -- shall refer to the KMED Project, the subject of this Agreement.
- W. Project Plan -- is the detailed written schedule consisting of the list of tasks to be completed and the timetable for meeting these tasks.
- X. Proposal -- shall refer to the Contractor's bid response to EVT0000186, Contractor's Response to Amendments 1-7, Contractor's Revised Offer dated May 10, 2011, and the Contractor's Pre-Negotiations Response dated June 6, 2011.
- Y. Request for Proposal or RFP -- shall consist of the State's Request for Proposal No. EVT0000186, its Amendments 1-7, and accompanying exhibits.
- Z. Retainage -- is the amount of funds retained of all undisputed invoices payable to Contractor under this Agreement which shall be withheld by the State. See Section 4.67.
- AA. Services -- are the measurable, verifiable outcomes or results that are conducted to complete this Project or part of this Project. Services are subject to Acceptance by the State's KMED Project Director or other authorized State personnel.
- BB. Site -- is the location (as determined by the State) of the State's facilities where the software and software documentation may be used or stored.
- CC. Source Code -- is any human-readable code developed from which the program when compiled becomes the Object Code.
- DD. Specifications -- means the explicit description of the functionality, capabilities, and other requirements for all KMED components as defined and finally approved by the parties including the design Deliverables.
- EE. State -- means the State of Kansas, Executive, Judicial and Legislative Branches, including the Department of Health and Environment, KMED Project, and any internal State entities, including State Departments, Agencies, Board of Trustees, Affiliates, Officers, Directors, Agents, Employees and successors, respectively.
- FF. Statement of Work or SOW -- is the detailed narrative which describes with specificity the respective scope obligations of the parties, including a description of Contractor's Deliverables and Services for the KMED Project and the State's performance requirements in order to complete the KMED Project as contained in the Deliverable Expectations Documents and Specifications.
- GG. Task Order -- is the mechanism by which the State and Contractor mutually agree upon

the delivery of and payment for additional deliverables and services not anticipated prior to the execution of this Agreement.

- HH. Task Order Request – is the description of an initially perceived problem or the initially conceived desired result of implementation of a Task Order used to perform an initial analysis. The State or Contractor (provided a State employee sponsors the Task Order Request) may initiate a Task Order Request. See Exhibit D
- II. Third Party Materials – are any patented, trademarked, or copyrighted designs, devices, materials, or other intellectual property, tangible or intangible, including software or other materials, neither owned by the Contractor or the State which are used for the completion or operation of the KMED Project.
- JJ. Viruses – are any malicious software designed to infiltrate or damage a computer system installed without the State's informed consent, such as worms, spyware, root kits, botnets, Trojan horses and backdoors.
- KK. Warranty Period – is defined in Section 4.50.

#### **4.39 Definite Quantity Contract**

The Request is for a close-ended contract between the Contractor and the State to furnish a predetermined quantity of a good or service during a given period of time.

#### **4.40 HIPAA Confidentiality**

Per the Health Insurance Portability and Accountability Act (1996) (HIPAA), the agency is a covered entity under the act and therefore Contractor is not permitted to use or disclose health information in ways that the agency could not. This protection continues as long as the information or data is in the hands of the Contractor.

The Contractor shall establish and maintain procedures and controls acceptable to the agency to protect the privacy of members' information. Unless the Contractor has the member's written consent, the Contractor shall not use any personally identifiable information obtained for any reason other than that mandated by this agreement.

The successful Contractor must sign a Business Associate Agreement (Exhibit J) at the time of Contract award (when signing the Contract). This document will contain additional HIPAA, Personally Identifiable Information (PII), and conflict of interest language required with this contract.

#### **4.41 Off-Shore Sourcing**

Contractors shall disclose in their bid response the location where the contracted services will be performed and whether or not any of the work necessary to provide the contracted services will be performed at a site outside the United States. Data containing Private Health Information (PHI) or Personal Identification Information (PII) shall not be transmitted to or processed at any site outside the United States.

If, during the term of the contract, the Contractor or subcontractor plans to move work previously performed in the United States to a location outside of the United States, the Contractor shall immediately notify the Division of Purchases and the respective agency in writing, indicating the desired new location, the nature of the work to be moved and the percentage of work that would be relocated. The Director of Purchases, with the advice of the respective agency, must approve any changes prior to work being relocated. Failure to obtain the Director's approval may be grounds to terminate the contract for cause.

#### **4.42 Mandatory Provisions**

The provisions found in Contractual Provisions Attachment (DA 146a) are incorporated by reference and made a part of this contract.

#### **4.43 Prices**

Prices shall remain firm for the entire contract period and subsequent renewals. Prices shall be net delivered, including all trade, quantity and cash discounts. Any price reductions available during the contract period shall be offered to the State of Kansas. Failure to provide available price reductions may result in termination of the contract for cause (Exhibit I).

#### **4.44 Payment**

Payment schedule shall be on a frequency mutually agreed upon by both the agency and the Contractor.

#### **4.45 Upgrades**

Contractors shall indicate the upgrade price and policy for any software, firmware, or hardware upgrades anticipated for the equipment bid. If the upgrades are provided without cost, this should be indicated.

#### **4.46 Demonstration Requirements**

A demonstration of the selected devices/equipment/solution for the using agencies may be required before final contract approval. The State of Kansas reserves the right to request said devices/equipment/solution fully configured/operational for testing, which shall be furnished at no expense to the State within ten (10) days after receipt of request. Devices/equipment will be returned at the Contractor's expense if not consumed during the evaluation process. Contractor's delivery of such devices/equipment/solution shall not constitute a transfer of title to the State. Any demonstration of the selected devices/equipment/solution shall not be subject to the Freedom of Information Act or otherwise be considered with the public domain.

#### **4.47 Performance Guaranty/Bond**

The Contractor shall file with the Director of Purchases a performance guaranty/bond in the amount of \$2,000,000. The guaranty shall be released upon the completion of this contract subject to total or partial forfeiture for failure to adequately perform the terms of this contract. If damages exceed the amount of the guaranty, the State may seek additional damages.

A performance guaranty must be one of the following: (1) certificate of deposit payable to the State; or (2) a properly executed bond payable to the State.

Necessary bond forms will be furnished by the Division of Purchases and can be completed by any General Insurance Agent. Bonds shall be issued by a Surety Company licensed to do business in the State of Kansas.

#### **4.48 Equipment**

All proposed equipment, equipment options, and hardware expansions must be identified by manufacturer and model number and descriptive literature of such equipment must be submitted with the bid response.

#### **4.49 Implied Requirements**

To the extent any products and services not specifically mentioned in this solicitation, but which are necessary to provide the functional capabilities described by the specifications, or to make the Contractor's proposal compliant with the specifications, the parties shall meet to negotiate in good faith the implementation of any required changes pursuant to the Change Control process described herein. Furthermore, all products and services required to make the Contractor's proposal functional shall be identified in the Contractor's proposal. If additional products or services are later found to be necessary to make the Contractor's proposal functional, or to make the Contractor's proposal compliant with the specifications, regardless of whether the additional needed products or services are identified as being necessary by the State or the Contractor, such products or services shall be provided by the Contractor at no charge to the State.

#### **4.50 Warranty**

The State requires a warranty on any and all equipment, hardware, software, and services. The date the defect or issue was discovered will be the determination date for warranty purposes. This warranty shall be included in the cost of the solution.

The Contractor warrants its installation and integration of hardware, equipment, software and the provision of services for a period of twelve (12) months from the date of Post Go-live System Acceptance as confirmed by completion of the Post Go-Live System Acceptance Checklist. The date a defect is discovered shall be the determination date for warranty purposes.

The Contractor will be the sole point of contact on any problems with the equipment, hardware, software, systems or services proposed during the warranty period.

The Contractor shall be responsible for all work performed under the agreed upon performance specifications. The Contractor shall make good, repair and replace, at the Contractor's own expense, as may be necessary, any defective work, material acceptance, if in the opinion of the agency or the Division of Purchases said defect is due to imperfection in material, design, or workmanship for the warranty period specified.

With respect to all third party materials and services included within the Deliverables or Services used in the performance of its obligations under the Contract or purchased on behalf of the State, Contractor will so notify the State of such use or purchase. The Parties agree that regarding such usage or purchase, the Contractor shall pass through or assign to the State the rights Contractor obtains from the third parties of such third party materials and services, including warranty and indemnification rights, all to the extent that such rights are assignable. The State acknowledges and agrees that the provisions of the applicable third party agreement will supersede any requirements of this Agreement with respect to the third party materials and Contractor shall not have any greater obligations or liability for third party materials beyond the provisions of the applicable agreement with the third party.

#### **4.51 Acceptance**

No contract provision or use of items by the State shall constitute acceptance or relieve the Contractor of liability in respect to any expressed or implied warranties.

#### **4.52 Ownership**

All data, forms, procedures, software, manuals, system descriptions, or set of systems rules, source code, and workflows that Contractor originates, prepares and delivers to the State of Kansas pursuant to the agreed upon Statement of Work under this Contract shall be owned by the State of Kansas. The Contractor may not release any such materials described in this Section to any third party without the written approval or license agreement of the specific using agency. The contract language in sections 4.52 Ownership, and 4.53 Software Code and Intellectual Property Rights, take precedence over the Software License Agreement attached to this Agreement as Exhibit E.

#### **4.53 Software Code and Intellectual Property Rights**

**A.** For purposes of this Agreement, the term "Intellectual Property" shall be defined as an umbrella term for a variety of legal entitlements which attach to certain products of the human intellect, including but not limited to, copyrights (original works of authorship fixed in a tangible medium of expression), trademarks, and patents (exclusive rights granted by the government for inventions that are useful, novel, and non obvious (see Kansas Information Technology Executive Council, Information Technology Policy 1500 - Ownership of Software Code and Related Intellectual Property (dated, 27 July, 2000; revised, 24 January 2008)). "Commercial Off the Shelf Software (COTS Software)" and "Contractor COTS Software" used in this agreement shall be in accordance with the definition of Proprietary Software included in 45 C.F.R. § 95.617(c).

**B.** The State will have all ownership rights in all elements of the Deliverables that Contractor originates, designs, develops, completes, delivers, and installs under this Contract, including but not limited to all software, any modifications thereto, and all associated documentation, materials, work products, data, models, forms, source code, procedures, manuals, systems descriptions, workflows and other Intellectual Property originated, designed, developed, delivered and installed by the Contractor for the benefit of the State pursuant to 7 CFR 277.13(g) and 45 C.F.R. § 95.617 (*hereinafter*, "Contract Work Product"). All Contract Work Product will become property of the State upon delivery of the Contract Work Product to the State and payment by the State to Contractor. The Parties acknowledge that all software provided to the State of Kansas under this Agreement to which 7 CFR 277.13(g) and/or 45 CFR 95.617(a) and (b) applies will be governed by and subject to the provisions of such regulations. Nothing in this Agreement will be deemed to grant Contractor any ownership rights in such software not specifically provided in these regulations. The contract language in sections 4.52 Ownership, and 4.53 Software Code and Intellectual Property Rights, take precedence over the Software License Agreement attached to this Agreement as Exhibit E.

**C.** Contract Work Product shall not include third party proprietary operating software packages (e.g., ADABAS, TOTAL, Adobe, etc.) which are provided at established catalog or market prices and sold or leased to the general public ("Third Party COTS Software"). For purposes of this Agreement, Third Party COTS Software specifically excludes The C-IV System, as described herein. All Intellectual Property and ownership rights in Third Party COTS Software shall remain with the independent software proprietary owner ("ISV"). The Contractor shall pass through to the State licenses for all Third party COTS Software pursuant to the ISV's standard license agreement.

**D.** The State of Kansas hereby grants the Contractor a world-wide, non-exclusive, perpetual, irrevocable, fully-paid up, royalty free license (with right to sublicense royalty-free, and the right of sub-licensees to sublicense further royalty-free, pursuant to the terms of this agreement) of all such Contract Work Product and related Intellectual Property rights, including the right to create derivative works based on, and otherwise modify, make, reproduce, or otherwise distribute, perform or display, the Contract Work Product

**E.** Except as otherwise expressly provided herein, Contractor may otherwise use the Contract Work Product or related or underlying general knowledge, skills, ideas, concepts, techniques and experience developed under this Agreement in the course of Contractor's business. The State of Kansas reserves the right to use any and all ideas presented in a Contractor's Proposal unless Contractor presents a valid legal case that such ideas are trade secret or confidential information, and identifies the information as such in its Proposal. Contractor may not object to the use of ideas that are not the Contractor's intellectual property and so designated in the proposal that: (1) were known to State of Kansas before the submission of the proposal, (2) were in the public domain through no fault of State of Kansas, or (3)

became properly known to State of Kansas after proposal submission through other sources or through acceptance of the proposal.

F. Other than Contract Work Product or Third Party COTS Software, Contractor shall have and maintain all title and ownership to any software, tools, and methodologies existing prior to commencement of the Contract, or developed outside the scope of the Contract, that are proprietary to Accenture or to third parties, including all Intellectual Property rights therein and together with any enhancements and/or modifications thereto ("Pre-Existing IP"), whether or not embedded in, delivered or operating in conjunction with Contract Work Product, Third Party COTS Software, or hardware. Pre-Existing IP shall include the Accenture Public Service Platform Technical Architecture tool.

G. The Parties agree that Contractor shall deliver Contractor's own proprietary Software under this Contract, which is being provided at established catalog or market prices and is available for sale or lease to the general public ("Contractor COTS Software"). Contractor COTS Software consists of three (3) products which are: (i) The Accenture Public Service Platform SOA Architecture Tool (a/k/a "APSP"); (ii) The APSP Citizen Portal; and (iii) the APSP Public Assistance Accelerator as licensed at the beginning of the Project, excluding C-IV Derivatives. All ownership rights in any Intellectual Property within Contractors' COTS Software shall remain with the Contractor.

H. The Parties acknowledge that the APSP Public Assistance Accelerator software, further identified in subsection I. below, also contains, in part, derivative works from the California Statewide Automated Welfare System (SAWS) Consortium-IV's benefit system, entitled The C-IV System. The State of Kansas agrees to obtain a license to the elements of the APSP Public Assistance Accelerator that are derivative works of The C-IV System directly from the SAWS Consortium-IV.

I. With respect to products or components of the Contractor COTS Software other than those derivative works from The C-IV System contained within the APSP Public Assistance Accelerator, Contractor shall provide the State of Kansas with a license to Contractor's COTS Software, pursuant to a Software License Agreement attached to this Contract at Exhibit E. Such license shall grant the State of Kansas a non-exclusive, perpetual, irrevocable, fully paid up, license to use, execute, sublicense, publish (pursuant strictly to transfer of the KMED solution via 45 CFR 95.617(b)), modify, create derivative works, and copy for backup purposes and display the Contractor COTS Software.

J. Exhibit K attached specifies the ownership and applicable federal matching funds for each element of software included in the K-MED Solution, as defined in Section 4.53.1.A. below, and to the extent any conflict exists between Exhibit K and this Section 4.53, Exhibit K will take precedence and will control over the provisions of this Section 4.53.

#### **4.53.1 Transfer of the K-MED Solution**

A. As a function of this Agreement, and by operation of this Section, the State of Kansas will receive a Deliverable entitled "The K-MED Solution," which will be comprised of the Citizen Portal, the Public Assistance Accelerator (inclusive of the derivative works the State receives as a license from the C-IV System), and any enhancements thereto that Contractor develops in conjunction with Kansas and as a function of the work first originated, prepared and delivered by Accenture pursuant to this Contract, which will result in the Deliverable entitled K-MED/AVENUES (a/k/a K-MED Solution). The K-MED Solution shall not include any Third Party COTS Software.

B. Contractor hereby grants the State of Kansas a further right to sublicense The K-MED Solution to other States, the District of Columbia, and the commonwealths, territories, and possessions of the United States ("States") that request a transfer, which includes the pass through of a royalty-free license to the Contractor's COTS Software included in the K-MED Solution, pursuant to 45 C.F.R. § 95.617, and 45 C.F.R Section 95, Subpart F. Any waiver of a royalty payment to Contractor shall apply only to the transfer of the entire K-MED Solution (or elements therein of the system enhanced pursuant to federal funds) and shall not apply to a transfer of piece-parts of the K-MED solution which represent Pre-Existing IP. As a function of the transfer, Accenture shall continue to retain all ownership rights in its own Intellectual Property.

C. The Transfer shall not restrict Accenture's rights to offer fee-based application maintenance or other software services in support of the K-MED solution for the benefit of other States. Accenture shall retain the right to market, sell, and develop its Pre-Existing IP product



suite to other States, and may impose a license fee to any State who does not request a Transfer of the K-MED solution. Accenture may not charge additional royalties or license fees for any Contract Work Product it includes in future iterations of its software product suite nor any derivatives thereof. The State retains ownership of the Contract Work Product. Accenture shall retain the right to market, sell, and develop its Contractor COTS Software product suite to other States, and may impose a license fee to any State who does not request a Transfer of the K-MED solution, including those States who may choose to participate in the K-MED Multi State Software as a Service Option described in Exhibit G of this Agreement.

#### **4.54 Data**

Any and all data required to be provided at any time during the bid process or contract term shall be made available in a format as requested and/or approved by the State.

#### **4.55 Submission of the Bid**

Submission of the bid shall mean the Contractor agrees that it is conversant with local facilities and difficulties, the requirements of the documents and of pertinent State and/or local codes, state of labor and has made due allowances in this Agreement for all contingencies. State represents that it has reasonably disclosed, and will continue to disclose as necessary, all pertinent information concerning the Project of which it has knowledge. Based on Contractor's due diligence and State's disclosures, during the development of the Specifications Contractor will present the best reasonable options and alternatives with guidance concerning the applicable advantages and disadvantages of such alternatives.

#### **4.56 New Materials, Supplies or Equipment**

Unless otherwise specified, all materials, suppliers or equipment offered by the Contractor shall be new, unused in any regard and of most current design. Seconds or flawed items will not be acceptable. All materials, supplies or equipment, in accord with the warranty provisions set forth in Section 4.50 of this Contract, shall be suitable for their intended purpose and, unless otherwise specified, fully assembled and ready for use on delivery.

#### **4.57 Contractor Contracts**

Contractors must include with their RFP response, a copy of any contracts, agreements, licenses, warranties, etc. that the Contractor would propose to incorporate into the contract generated from this Bid Event. (State of Kansas form DA-146a remains a mandatory requirement in all contracts.)

#### **4.58 Contract Price**

Statewide contracts are awarded by the Division of Purchases to take advantage of volume discount pricing for goods and services that have a recurring demand from one or more agencies. However, if a state agency locates a Contractor that can provide the identical item at a lower price, a waiver to "buy off state contract" may be granted by the Division of Purchases.

#### **4.59 Transition Assistance**

In the event of contract termination or expiration, Contractor shall provide all reasonable and necessary assistance to State to allow for a functional transition to another Contractor. Such services shall be provided on a negotiated Task Order for transition work.

#### **4.60 Award**

Award will be line item or group total, whichever is the best interest of the State of Kansas.

#### **4.61 Termination for Unavailability of Funds**

It is understood and agreed by the Contractor and the State of Kansas that all obligations of the State of Kansas including continuance of payments hereunder, are contingent upon the availability and continued appropriation of state and federal funds, and in no event shall the State of Kansas be liable for any payments hereunder in excess of such available appropriated funds. In the event that the amount of any available or appropriated funds provided by the state or federal sources for the purchase of services hereunder shall be reduced, terminated or shall not be continued at an aggregate level sufficient to allow for the purchase of the services specified hereunder for any reason whatsoever, the State of Kansas shall notify the Contractor of such reduction of funds available and shall be entitled to reduce the State's commitment hereunder or to terminate the contract as it deems necessary.

#### **4.62 Termination Obligations of Contractor and the State of Kansas**

In the event of any termination, the Contractor shall:

- a. Stop work under the contract on the date and the extent specified in the notice of termination.
- b. Place no further orders or subcontractor services or facilities except as may be necessary for completion of such portion of the work under the contracts as is not terminated.
- c. Terminate all orders and subcontracts to the extent that they relate to the performance of work terminated by the notice of termination.
- d. Complete the performance of such part of the work as shall not have been terminated by the notice of termination.
- e. Any payments advanced to the Contractor for coverage of members for periods after the date of termination shall be promptly returned to the State of Kansas.
- f. The Contractor shall promptly supply all information necessary for the reimbursement of any outstanding claims.
- g. The Contractor shall comply with the terms and provisions of the turnover plan as submitted and approved. The final monthly payment will be withheld until all applicable data transition issues are resolved. If data transition is not completed within ninety (90) calendar days, damages will be assessed at 20% of the final monthly payment with an additional 10% assessed for every 15 calendar days thereafter.

#### **4.63 Geographic Information System (GIS) Compliance**

All databases created in this work shall be compliant with existing GIS development standards and enterprise infrastructure to optimize spatial functionality and encoding for address data elements. The

Kansas enterprise Geographic Information System (GIS) is based on Environmental Systems Research Institute (ESRI) technology. Kansas supports both internal and external web map service environments and server-side web map development is an emerging trend in GIS development standards, along with higher utilization of centralized spatial database engine (SDE) and implementation of comprehensive geocoding and address standardization. The Kansas GIS infrastructure includes central file servers, central Oracle SDE spatial databases, and concurrent desktop licenses for ArcGIS, and extension products, along with GPS field data collection and data management tools for spatial databases. Kansas supports and implements the GIS Addressing Standard established by the Kansas GIS Policy Board. A copy of this standard is accessible from the Kansas GIS website link at [http://www.da.ks.gov/kito/itec/documents/addressing\\_standard.pdf](http://www.da.ks.gov/kito/itec/documents/addressing_standard.pdf).

#### **4.64 Technology Architectural Compliance**

All information technology initiatives and acquisitions will comply with the Kansas Information Technology Architecture, which can be viewed at [http://www.da.ks.gov/kito/cita/documents/KITA\\_Ver11.2\\_Final4.pdf](http://www.da.ks.gov/kito/cita/documents/KITA_Ver11.2_Final4.pdf).

For information technology projects with total cumulative cost greater than \$250,000, project plan documents must include an Architectural Statement for review by the Chief Information Technology Officer (CITO) of the appropriate branch.

Compliance with the Technology Architecture is assured when:

- A. An item is selected for purchase from a state contract listed in the Technology Architecture; or
- B. An item is included in a general category listed under the heading "Acceptable Standard" or "Emerging Standard" in the Technology Architecture; or
- C. The item conforms to a technical standard listed under the headings "Acceptable Standard" or "Emerging Standard" in the Technology Architecture.

Compliance with the Technology Architecture is problematic when an item conforms to a technical standard or is included in a general category under the heading "Retired Standard" in the Technology Architecture. Contractors shall provide justification for new acquisitions or initiatives that are proposed under this heading. All state contracts for information technology products must conform to the Technology Architecture. Contractor certifies and warrants that all their offerings are in conformance with the Kansas Information Technology Architecture.

#### **4.65 Project Management Methodology**

The State of Kansas has adopted a uniform Project Management Methodology for all Information Technology (IT) projects valued at \$250,000 or more. The methodology can be found at <http://da.state.ks.us/kito> under "Information Technology Project Management." Kansas has enacted comprehensive statutes (K.S.A. 75-7203 et. seq.) dealing with the architecture, management, and oversight of IT activities statewide. The Information Technology Executive Council (ITEC), implementing their oversight responsibilities under those statutes, has adopted ITEC Policy 2500, which can be found at <http://www.da.ks.gov/kito/itec/ITPoliciesMain.htm>. That policy sets forth project reporting requirements.

The Contractor shall deliver to the agency all information regarding Contractor performance necessary for the agency to meet its project reporting obligations under ITEC policies. Such information may include, but shall not be limited to:

- A. Work Breakdown Structure:
  - (i) With summary level tasks; and
  - (ii) With individual tasks at less than or equal to 80 hours apiece.
- B. Estimated cost to completion data;

C. Gantt charts:

- (i) With critical path identification;
- (ii) With identifying milestones;
- (iii) Showing progress to date;
- (iv) With identified start and finish dates for all tasks; and
- (v) Correlated one-to-one with the Work Breakdown Structure.

When requested by the State, the project reporting information shall be provided in compatible electronic form, as well as printed output. The State uses Microsoft Project as its primary project management software package.

Larger or more complex projects, or projects encountering difficulties, may require additional data reports, or an increased reporting frequency. Such additional requirements shall be maintained and supported by the Contractor, if required by the agency to meet the requirements of the Kansas Information Technology Office (KITO) or the legislative Joint Committee on Information Technology (JCIT).

## **4.66 Liquidated Damages**

The required Liquidated Damages (LD) are specified in RFP Appendix 13

The following language shall be included Appendix 13 Liquidated Damages:

The State may choose, as an alternative that the Contractor shall provide the value of LD in the form of a Service Credit that reflects the equivalent amount of hours billed by the Contractor on the Project.

The State's use of Service Credits shall be entirely discretionary and Contractor acknowledges and agrees that the State may always choose to impose a LD based upon the dollar values identified herein.

With respect to any Liquidated Damage Assessment not utilized as a Service Credit by Contractor within 180 days of the State's assessment of the LD shall operate to convert the Service Credit to a monetary LD and the value of such LD shall be deducted from the Contractor's next invoice.

The State acknowledges that any incident that gives rise to an LD and for which the State exercises its right to assesses LDs, either as a cash amount or a Service Credit, shall not operate as a concurrent finding of breach of the Contract. The State's choice to impose LDs on Contractor, once exercised, shall serve as the sole and exclusive remedy of the State for a particular incident of Contractor non-performance. This shall not operate as a restriction on the State to conclude that a series of LD incidents, collectively, reflect a cumulative breach of Contractor's performance obligations herein.

As a function of the above options available to the State to utilize LDs to incentivize Contractor performance, Contractor and the State shall make commercially reasonable efforts to meet in good faith, in advance of any determination that an LD may apply for Contractor performance and to develop a written record of communication with the Contractor regarding any activities which could give rise to imposition of LDs. As a minimum guideline, the State will notify the Contractor prior to delivery of a notice informing Contractor of the potential for a LD and making a request for a Corrective Action Plan, as described herein

Liquidated damages shall only be due from Contractor if the failure of performance was not directly caused third parties (but not Contractor's subcontractors), force majeure events, or other events beyond Contractor's reasonable control. To the extent that the State materially causes the delay, no liquidated damages will be applied to Contractor."

The Performance Guarantee language in Appendix 13 Liquidated Damages Requirement one (1) is modified as follows:

Start Up: Contractor must have the development facility ready and appropriately staffed and trained to begin providing services within **60** calendar days from Project Execution Date.

The following language is added to Appendix 13 Liquidated Damages as requirement 19,

Requirement: **Print/Mail (1):** Letters and other documents will be printed and mailed accurately according to performance expectation number 63.

Liquidated Damages: If violation is not corrected in five instances of failing to meet expectations, then \$100 shall be assessed for each instance (letter or document) identified as inaccurate.

Requirement: **Print/Mail (2):** Letters and other documents will be printed and mailed timely, accurately and legibly according to performance expectation numbers 64 through 67.

Liquidated Damages: Any print/mailling not corrected within three business days of each occurrence will be assessed at the greater of \$.10 per item (letter or document) or \$1,000 per occurrence.

The following language is added to Appendix 13 Liquidated Damages as requirement 21,

Requirement: **Hosting Turnover Task Contractor Responsibilities:** Contractor shall comply with Hosting Turnover Plan.

Liquidated Damages: If the Contractor is non-compliant or non-cooperative with the approved transfer plan. The contractor shall be held liable for all expenses associated with the delay of the transition and a ten (10%) percent damage assessment will be made to the Contractor's final invoice.

The Performance Guarantee language in Appendix 13 Liquidated Damages Requirement 13 is modified as follows:

**Non-Hosting** System Unavailability or unscheduled availability of which the Contractor does not notify the State's project administrator or **Hosting** System Unavailability or unscheduled availability of which the Contractor does not notify the State's project administrator. Please see Performance Expectations Section A in RFP Appendix 12.

The Liquidated Damages language in Appendix 13 Liquidated Damages Requirement 13 is modified as follows:

\$1,000 for each calendar day of each occurrence for a Non-Hosting system. \$1,500 for each calendar day of each occurrence for a Hosting system.

## **4.67 Payment Retainage**

A. Retainage in an amount of ten percent (10%) of all contract payments will be withheld by the State until 90 days after the final State approval of all services to be performed by the Contractor under this Contract and formal acceptance by the State of the new K-MED System, as well as all deliverables. The following will be excluded from Retainage, maintenance services, postage payments made on behalf of the state as pass through payments, monthly lease payments on Contractors Topeka facility. In addition the following ten (10) Project Management Operations (PMO) staff are excluded from Retainage; 1 Project Manager, 1 Client Account Lead, 1 PMO Manager, 1 System Manager, 1 Testing Manager, 1 Training Lead, 2 Technology Managers and 2 Quality Assurance Directors. Compensation is not deemed to have been earned until all conditions precedent to payment has been met.

B. The Retainage amount shall, subject to subsection (D) infra, increase immediately and through the remainder of this Contract, in the event that two or more deliverables have been received after their due date as a result of Contractor's late delivery or in the event that two or more deliverables have been received in such poor quality as determined by the State, that the State has notified Contractor that the deliverables are unacceptable and given to the Contractor a notice, in writing, from the State, to cure in accordance with the terms of this Contract. In either case, Retainage shall increase immediately so that fifteen percent (15%) of all contract payments will be withheld by the State until 90 days after the final

State approval of all services to be performed by the Contractor under this Contract (less the exemptions listed above) and formal acceptance by the State of the new K-MED System, as well as all deliverables.

C. The Retainage amount shall, subject to subsection (D) infra, increase immediately and through the remainder of this Contract, in the event that three or more deliverables have been received after their due date or other agreed upon timeframe, as a result of Contractor's late delivery or in the event that three or more deliverables have been received in such poor quality as determined by the State, that the State has notified Contractor that the deliverables are unacceptable and given to the Contractor a notice in writing, from the State, to cure in accordance with the terms of this Contract. In either case, Retainage shall increase immediately so that twenty percent (20%) of all contract payments will be withheld by the State until 90 days after the final State approval of all services to be performed by the Contractor under this Contract (excluding maintenance services, postage payments made on behalf of the state as pass through payments and monthly lease payments on Contractors Topeka facility) and formal acceptance by the State of the new K-MED System, as well as all deliverables.

D. The State may, at its sole discretion, waive all or part of any of the aforementioned conditions or actions, via written notice to the Contractor, one or more times and such waiver(s) shall not prohibit the State from enacting such conditions or actions at a later date at its sole discretion.

E. The provisions of subsections (B) and (C) herein shall apply only where Contractor or Subcontractors are the sole source of any delay or late delivery.

F. If the contract is terminated for cause, convenience or unavailability of funds, any Retainage held prior to termination will be released to the Contractor thirty days following the effective date of the termination.

#### **4.68 Date Data Compliance**

The Contractor warrants fault-free performance in the processing of date and date-related data (including, but not limited to, calculating, comparing, and sequencing) by all goods and services delivered. Fault-free performance includes, but is not limited to, the manipulation of data with correct results when using dates prior to, through, and beyond January 1, 2000, and shall be transparent to the user.

Hardware and software products, individually and in combination, shall provide the correct system date and correct calculations which utilize or refer to the date data, without human intervention, including leap year calculations. Hardware and software products, individually and in combination, shall also provide correct results when moving forward or backward across the year 2000.

#### **4.69 Limitation of Liability**

Neither party shall be liable to the other for punitive damages arising from this Agreement, including, without limitation, any claims by Contractor for lost profits. The total liability of Contractor shall be limited to direct, indirect and consequential damages not to exceed an aggregate amount equal to two times the fixed fee amount of this Agreement including amendments, change control requests and task orders. The State's liability shall be limited to and not exceed that which is contained in the Kansas Tort Claims Act, K.S.A. 75-6101 et seq.

#### **4.70 Change Orders**

Contractor agrees to use the Change Control Process included in the RFP.

## **4.71 Use of Deliverables**

The Parties agree that the States use of Deliverables and the Contractors' development of those Deliverables will be subject to applicable requirements; including any amendments thereto. The State shall maintain responsibility for the interpretation of all regulatory requirements whether established or received after the Contract Start Date. The State will provide Contractor with written directives to implement such regulatory changes. In the event of a regulatory change that impacts any -existing Specifications, the parties shall evaluate the impact of such change and execute a similar Change Control Request as necessary.

## **4.72 FNS Required Federal Provisions**

The contractor must comply with the following provisions:

1. Executive Order 11246, entitled "Equal Employment Opportunity," as amended by Executive Order 11375, and as supplemented by the Department of Labor Regulations (41 CFR Part 60): The Executive Order prohibits federal contractors and federally-assisted construction contractors and subcontractors who do over \$10,000 in Government business in one year from discriminating in employment decisions on the basis of race, color, religion, sex, or national origin. The Executive Order also requires Government contractors to take affirmative action to ensure that equal opportunity is provided in all aspects of their employment.
2. **The Clean Air Act, Section 306:**
  - a. No Federal agency may enter into any contract with any person who is convicted of any offense under section 113(c) for the procurement of goods, materials, and services to perform such contract at any facility at which the violation which gave rise to such conviction occurred if such facility is owned, leased, or supervised by such person. The prohibition in the preceding sentence shall continue until the Administrator certifies that the condition giving rise to such a conviction has been corrected. For convictions arising under section 113(c)(2), the condition giving rise to the conviction also shall be considered to include any substantive violation of this Act associated with the violation of 113(c)(2). The Administrator may extend this prohibition to other facilities owned or operated by the convicted person.
  - b. The Administrator shall establish procedures to provide all Federal agencies with the notification necessary for the purposes of subsection (a).
  - c. In order to implement the purposes and policy of this Act to protect and enhance the quality of the Nation's air, the President shall, not more than 180 days after enactment of the Clean Air Amendments of 1970 cause to be issued an order (1) requiring each Federal agency authorized to enter into contracts and each Federal agency which is empowered to extend Federal assistance by way of grant, loan, or contract to effectuate the purpose and policy of this Act in such contracting or assistance activities, and (2) setting forth procedures, sanctions, penalties, and such other provisions, as the President determines necessary to carry out such requirement.
  - d. The President may exempt any contract, loan, or grant from all or part of the provisions of this section where he determines such exemption is necessary in the paramount interest of the United States and he shall notify the Congress of such exemption.
  - e. The President shall annually report to the Congress on measures taken toward implementing the purpose and intent of this section, including but not limited to the progress and problems associated with implementation of this section. [42 U.S.C. 7606]
3. **The Clean Water Act:**
  - a. No Federal agency may enter into any contract with any person who has been convicted of any offense under Section 309(c) of this Act for the procurement of goods, materials, and services if

such contract is to be performed at any facility at which the violation which gave rise to such conviction occurred, and if such facility is owned, leased, or supervised by such person. The prohibition in preceding sentence shall continue until the Administrator certifies that the condition giving rise to such conviction has been corrected.

- b. The Administrator shall establish procedures to provide all Federal agencies with the notification necessary for the purposes of subsection (a) of this section.
- c. In order to implement the purposes and policy of this Act to protect and enhance the quality of the Nation's water, the President shall, not more than 180 days after the enactment of this Act, cause to be issued an order:
  - (1) requiring each Federal agency authorized to enter into contracts and each Federal agency which is empowered to extend Federal assistance by way of grant, loan, or contract to effectuate the purpose and policy of this Act in such contracting or assistance activities, and
  - (2) setting forth procedures, sanctions, penalties, and such other provisions, as the President determines necessary to carry out such requirement.
- d. The President may exempt any contract, loan, or grant from all or part of the provisions of this section where he determines such exemption is necessary in the paramount interest of the United States and he shall notify the Congress of such exemption.
- e. The President shall annually report to the Congress on measures taken in compliance with the purpose and intent of this section, including, but not limited to, the progress and problems associated with such compliance.
- f. (1) No certification by a contractor, and no contract clause, may be required in the case of a contract for the acquisition of commercial items in order to implement a prohibition or requirement of this section or a prohibition or requirement issued in the implementation of this section.  
(2) In paragraph (1), the term "commercial item" has the meaning given such term in section 4(12) of the Office of Federal Procurement Policy Act (41 U.S.C. 403(12)).

#### **4. The Anti-Lobbying Act:**

This Act prohibits the recipients of federal contracts, grants, and loans from using appropriated funds for lobbying the Executive or Legislative Branches of the federal government in connection with a specific contract, grant, or loan. As required by Section 1352, Title 31 of the U.S. Code and implemented at 34 CFR Part 82 for persons entering into a grant or cooperative agreement over \$100,000, as defined at 34 CFR Part 82, Section 82.105 and 82.110, the applicant certifies that:

- a. No federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of any agency, a member of Congress, an officer or employee of Congress, or an employee of a member of Congress in connection with the making of any federal grant, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any federal grant or cooperative agreement;
- b. If any funds other than federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a member of Congress, an officer or employee of Congress, or an employee of a member of Congress in connection with this federal grant or cooperative agreement, the undersigned shall complete and submit Standard Form – LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions;
- c. The undersigned shall require that the language of this certification be included in the award documents for all sub-awards at all tiers (including sub-grants, contracts under grants and cooperative agreements, and subcontracts) and that all sub-recipients shall certify and disclose accordingly.

#### **5. Americans with Disabilities Act:**



This Act (28 CFR Part 35, Title II, Subtitle A) prohibits discrimination on the basis of disability in all services, programs, and activities provided to the public by State and local governments, except public transportation services.

6. **Drug Free Workplace Statement:** The Federal government implemented the Drug Free Workplace Act of 1988 in an attempt to address the problems of drug abuse on the job. It is a fact that employees who use drugs have less productivity, a lower quality of work, and a higher absenteeism, and are more likely to misappropriate funds or services. From this perspective, the drug abuser may endanger other employees, the public at large, or themselves. Damage to property, whether owned by this entity or not, could result from drug abuse on the job. All these actions might undermine public confidence in the services this entity provides. Therefore, in order to remain a responsible source for government contracts, the following guidelines have been adopted:
7. The unlawful manufacture, distribution, dispensation, possession or use of a controlled substance is prohibited in the work place.
8. Violators may be terminated or requested to seek counseling from an approved rehabilitation service.
9. Employees must notify their employer of any conviction of a criminal drug statute no later than five days after such conviction.
10. Although alcohol is not a controlled substance, it is nonetheless a drug.
11. Contractors of federal agencies are required to certify that they will provide drug-free workplaces for their employees.
12. **Debarment, suspension, and other responsibility matters:** As required by Executive Order 12549, Debarment and Suspension, and implemented at 34 CFR Part 85, for prospective participants in primary covered transactions, as defined at 34 CFR Part 85, Sections 85.105 and 85.110.
  - a. The applicant certifies that it and its principals:
    - (1) Are not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from covered transactions by any federal department or agency;
    - (2) Have not within a three-year period preceding this application been convicted of or had a civil judgment rendered against them for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (federal, state, or local) transaction or contract under a public transaction; violation of federal or state antitrust statutes or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property;
    - (3) Are not presently indicted for or otherwise criminally or civilly charged by a governmental entity (federal, state, or local) with commission of any of the offenses enumerated in paragraph (1)(b) of this certification; and
    - (4) Have not within a three-year period preceding this application had one or more public transactions (federal, state, or local) terminated for cause or default.
  - b. Where the applicant is unable to certify to any of the statements in this certification, he or she shall attach an explanation to this application.
13. The federal government reserves a royalty-free, non-exclusive, and irrevocable license to reproduce, publish, or otherwise use, and to authorize others to use, for federal government purposes, the copyright in any work developed under a grant, sub-grant, or contract under a grant or sub-grant or any rights of copyright to which a contractor purchases ownership.

#### **4.73 Developmental Software License**

Contractor will deliver to the State Development versions of individual Releases of the Accenture Software to facilitate the State's development, evaluation, acceptance testing, and training on the

Accenture Software ("Developmental Releases"). Contractor hereby grants to the State a limited, non-exclusive, royalty-free, non-transferable, non-sub licensable right and license to us such Developmental Releases, in Source and Object code format, for its internal, non-commercial business purposes in connection with the development, evaluation, acceptance testing, and training on the Accenture Software. The State is strictly prohibited from copying, modifying, distributing or creating derivative works of the Developmental Releases, and shall not use the Developmental Releases, or any result of the development, evaluation, acceptance testing, and training for any purpose whatsoever other than to develop, evaluate and test the Accenture Software prior to final acceptance and payment for the Accenture software. All rights to the Developmental Releases that are not expressly granted to the State herein are reserved to Contractor and its licensor. This Developmental Software license shall expire upon the earlier of (i) expiration or termination of this contract or (ii) the State's acceptance of the Accenture Software Release pursuant to the RFP, Appendix 10. THE DEVELOPMENTAL RELEASES ARE "BETA" SOFTWARE, PROVIDED "AS IS." UNDER NO CIRCUMSTANCES SHALL LICENSEE INSTALL OR USE THE DEVELOPMENTAL RELEASES IN A PRODUCTION ENVIRONMENT.

#### **4.74 Accelerated Payments**

Within thirty (30) days after termination of the Contract pursuant to Section 4.6, the State shall have the ability to purchase the Accenture Software license fees ahead of schedule. Upon full payment of the scheduled Accenture Software License fees, the Contractor shall grant the State a perpetual, non-exclusive, royalty-free, irrevocable Accenture Software License(s) consistent with subsection 4.53(i). In the case of accelerated License payment by the State, the warranty provisions of Section 4.50 shall only apply to Deliverables that have been submitted and approved pursuant to Appendix 10 of the RFP. If the State elects to make accelerated payment towards Licensee fees, pursuant to this subsection, the payment Retainage provisions of Section 4.67 shall not apply.

#### **4.75 Accessible Technology**

**Computer Hardware, Software, Other Technologies:** All products and services provided or developed as part of fulfilling this contract shall conform to Section 508 of the Rehabilitation Act of 1973 and any amendments thereto, (29 U.S.C. & 794d), and its implementing Electronic and Information Technology Accessibility Standards (36 CFR § 1194). Section 508 requires that electronic and information technology is accessible to people with disabilities, including employees and members of the public. Information regarding accessibility under Section 508 is available at <http://www.section508.gov/>, and a technical assistance document can be found at <http://www.access-board.gov/sec508/guide/>.

**Web Development:** Websites, web services, and web applications shall be accessible to and usable by individuals with disabilities. This means that any websites, web services, and/or web applications developed in the fulfillment of this contract — including but not limited to: ((a) any web-based training material, user documentation, reference material, or other communications materials intended for public or internal use related to the work completed under this contract; and (b) any updates, new releases, versions, upgrades, improvements, bug fixes, patches, customizations, or other modifications to the above — shall comply with Kansas Information Technology Policy 1210: State of Kansas Web Accessibility Requirements (IT Policy 1210), IT Policy 1210 is located at <http://da.ks.gov/kito/itec/ITPoliciesMain.htm>. For additional reference, supporting information for implementing IT Policy 1210 can be found at <http://da.ks.gov/kpat/resources/>.

**Affirmation of Conformance:** The contractor shall provide a description of conformance with the above mentioned specifications by means of a completed Voluntary Product Accessibility Template (VPAT) or other comparable document (VPAT information is available at <http://www.itic.org/index.php?src=gendocs&ref=vpat&category=resources&submenu=Resources>). A

VPAT is only necessary when the Contractor is using pre-existing (off the shelf) software. This conformance claim becomes a contractual term between the contractor and the contracting state agency.

#### 4.76 Facilities Management Plan

The following Facilities Management Plan language in Appendix 6 section A6.3.1.1.5 is modified as follows:

"The Contractor must notify State of any changes in the Facilities Plan at least **60** days prior to the change".

#### 4.77 Maintenance Services

The state and Contractor agree that Contractor shall provide Maintenance Services for a defined period and pursuant to specific terms as described in the Statement of Work, attached to this Contract. The parameters and specific of any maintenance services shall be described therein, including the process by which the Contractor shall receive compensation for such Maintenance Services (See Exhibit H). The additional Maintenance Services shall be performed a team placed specifically by Accenture in Kansas.

Subject to the terms and conditions of the bid specifications and this contract, State hereby accepts offer of Contractor as expressed by Contractor's bid submitted to the Division of Purchases on January 4, 2011, in response to Bid Event Number EVT0000186.

It is understood and agreed by the parties that pursuant to the bid, Contractor agrees to Eligibility Determination (K-MED) Software with Associated Integration Services and Ongoing Operational Support for the Kansas Department of Health and Environment.

This contract is entered into this 29th day of August, 2011 by and between the State of Kansas (State) and Accenture, LLP.

Contractor: Accenture LLP

Agency: Kansas Department of  
Health and Environment

By: 

By: 

Printed Name: Sean Toole

Printed Name: Robert Moser MD

Title: Senior Executive

Title: Secretary

I hereby certify that the competitive bid/procurement laws of the State of Kansas have been followed.

State of Kansas

By: 

Chris Howe  
Director of Purchases